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IN THE

Supreme Court of the United States

October Term, 1958

No. [redacted] 122

HYMAN KARP and BENJAMIN T. MARCO,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

A. The Opinion Below

The Court of Appeals for the Second Circuit wrote an opinion, which has not yet been reported. Said opinion is printed in Appendix A, to the companion petition of the co-defendants Max and Norman Schaffer (No. 995, Oct. 1958 Term), and reference is respectfully made thereto.

B. Grounds on Which Jurisdiction of This Court Is Invoked

1. The judgment of the Court of Appeals sought to be reviewed was handed down on April 21, 1959. Said judg-

ment is printed in Appendix B to the Schaffer petition, *supra*, and reference is respectfully made thereto.

2. The Court of Appeals denied a petition for rehearing by order dated May 18, 1959. Said order is printed in Appendix C to the Schaffer petition, *supra*, and reference is respectfully made thereto. No extension of time within which to petition for certiorari has been requested or granted.

3. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U. S. C. Section 1254 (1).

C. Questions Presented

1. Did the prosecutor's remarks in summation, wherein he made representations to the jury, as of his personal knowledge, of matters not in the record, and wherein he tendered to the jury a false issue as to his own veracity and position, and made himself an unsworn witness for the prosecution, deprive petitioners of a fair trial?

2. Rule 8 (b) of the Federal Rules of Criminal Procedure recognizes and reflects the fundamental right of a criminal defendant to be tried alone and the justified opprobrium attaching to the mass trial. After a conspiracy count against several defendants is dismissed for lack of evidence, is it proper to continue a joint trial and to submit to a single jury the remaining counts, charging each defendant with an independent and unrelated offense?

3. Where the District Court has plainly refused to submit an issue of fact to the jury for its determination, can

the Court of Appeals properly affirm a conviction by reviewing the evidence and making a finding on that issue of fact adversely to the defendants?

4. The National Stolen Property Act makes certain interstate transportation a federal crime if the goods exceed $5,000 in value. Can this statute be interpreted to permit a conviction where the value element of the offense is established by adding together the values of several separate and distinct transactions, no one of which constituted a federal offense since the goods involved were valued at less than $5,000?

D. Statutes and Rules Involved

The statutes and rules involved are:

1. 18 U.S.C. Section 2311;
2. 18 U.S.C. Section 2314;
3. Rule 8 (b) of the Federal Rules of Criminal Procedure;
4. Rule 14 of the Federal Rules of Criminal Procedure.

All of the foregoing are set forth in the Schaffer petition, at pages 3 and 4, and reference is respectfully made thereto.

E. Statement of Facts

The petitioners respectfully refer to the "Statement of the Case", which appears at pages 5 to 8, inclusive, of the Schaffer petition, and adopt such statement.

It should be noted that petitioner Karp, on conviction, was sentenced to two years' imprisonment, and the payment of a fine of $10,000, and petitioner Marco was sentenced, after conviction, to four years' imprisonment and the payment of a $10,000 fine (pp. 15a to 18a, inclusive, Appendix of Appellants Karp and Marco).

Petitioners Karp and Marco, while joining in all the points and contentions made by the Schaffers, urge one additional ground for the granting of the writ herein, to wit, deprivation of fair trial by reason of the prosecutor's arguments in summation. Accordingly, the following facts, in addition to those set forth by the Schaffers, require mention here.

The cornerstone of the prosecution's case was the testimony of one Anthony Stracuzza, a confessed thief, admitted loan shark, gambler and tax-dodger; brother of Mario Stracuzza, another confessed and several-times-convicted thief; and husband of Dorothy Stracuzza, arrested and indicted in several cases, including the one at bar. Stracuzza gave important testimony bearing on the single, principal and crucial issue of the alleged guilty knowledge of the petitioners in buying the stolen goods from him. There never was any question but that all the petitioners had openly bought the goods, paid by check, and received shipments via recognized agencies; they had maintained complete written records of the transactions in their books, which were voluntarily turned over to the F.B.I. when the latter commenced their inquiry.

Anthony Stracuzza was accordingly subjected to heavy attack as to his credibility, on cross-examination. Basic in this attack was the consistent contention of the defense,

throughout the trial, that he was tailoring his testimony to favor the Government, in the expectation of a "reward"—lenient treatment for himself, his brother and his wife.

Thus, Anthony had been charged not only in the two indictments tried in the instant case, but he had also been indicted jointly with a number of truck-driver package thieves; in all of these cases he had pleaded guilty; in one additional case, resulting from a theft *after* he began to "cooperate" with the F.B.I., he had received a suspended sentence, with the help of the prosecutor, and in the others sentence had been repeatedly postponed, until after his testimony was given in the instant case. Mario, his brother, was in like state; he had pleaded guilty to three indictments, and his sentence was repeatedly adjourned until after the present trial. Moreover, Mario had been caught by State authorities in a theft *after* he began his "cooperation", and, on his plea of guilty in the State Court, sentence had been repeatedly postponed there, on representations that he was "cooperating" in the instant case, and his testimony was necessary. Finally, Anthony's wife, Dorothy, similarly indicted in the Federal Court in three cases, had been accorded a severance of trial, had never been placed on trial, had never pleaded guilty, and indeed, had never even been called as a witness in any trial.

Anthony and Mario had both testified at length for the Government in the prior trial of the thieves. Anthony, in the present trial, maintained that his wife had no guilty knowledge of his illegal activities (Tr., pp. 594, 599, 600-602), although he admitted testifying to precisely the opposite effect at the previous trial (Tr., pp. 594-595); in this connection he admitted that she maintained several bank accounts under different names, one of which was not her

own, in which proceeds of his sales to these defendants were deposited (Tr., pp. 491, 519, 649-651); that some of the checks were cashed in supermarkets (Tr., p. 523), that she had worked for several weeks in his office, up to the time of his arrest, making out bills, changing tickets on merchandise, and keeping records (Tr., pp. 600-601). Indeed, the fictitious name of the business ("A. Schafler"), was very much like her own maiden name "Schaefler" (Tr., pp. 595-598). In sum, she did everything, and knew everything—and far more—which it was charged the defendants did and knew, to fasten guilty knowledge on them, and yet she was claimed by Stracuzza to be innocent of wrongdoing.

The defense stated in the opening that it would prove its contention that the Stracuzzas were testifying for an anticipated reward in the shape of hoped-for lenient treatment (Tr., p. 299); it made known its contention that the government was under a duty to call Mario and Dorothy as witnesses, so that they could be subjected to cross-examination, and vigorously protested the prosecutor's refusal to do so (Tr., pp. 1157-1160); it tried unsuccessfully to introduce in evidence the complete statements which were made by the Government to the sentencing judge at the time Stracuzza was given a suspended sentence on a previous case (Tr., pp. 670-678); and attempted unsuccessfully—because the court kept it out—to show, by available court record evidence, that the large sums of cash seized from the possession of Mario and Dorothy Stracuzza, when they were arrested, were later returned to them with the consent of the United States Attorney when they "cooperated" (Tr., pp. 874-875).

Finally, in summation the defense argued that the Government's failure to call Mario and Dorothy o the stand, thus preventing their cross-examination, wa relevant in considering whether or not Anthony Stracuzza was testifying in hopes of a reward for himself and the members of his family (Tr., pp. 1471-1477, 1484).

The relevant excerpts from the defense summation are set forth in the Appendix of Karp and Marco, pages 1a to 9a, inclusive.

In answer, the prosecutor made certain statements, to which objection was noted, a motion for mistrial made and denied, and exception taken. (See Appendix of Karp and Marco, pp. 10a and 11a.) The tenor of these remarks was a disingenuous and misleading statement to the jury that Dorothy Stracuzza was "still a defendant in this court. The charges are still open against her. They have not been dismissed in any way" (Tr., p. 1550). Actually, on July 31, 1958, shortly after the present trial was completed, the Government entered *nolle prosequis* in all the cases against Dorothy Stracuzza (Tr., pp. 1689-1690).

Furthermore, the prosecutor went on to tell the jury that it was "the Government's representation to you that he [Mario Stracuzza, the brother, not called to the witness stand] could have offered nothing in the way of additional evidence that was not presented to you through his brother. • • • Furthermore, the Government is not required to call any witness if we believe that there is nothing further that that witness can contribute in the search for the truth" (Tr., pp. 1550-1551).

This "representation" of the prosecutor's own knowledge of the case, and the statement of his "belief" must be

weighed in light of the fact that although Anthony claimed that everything he sold to the defendants was stolen, he admitted that he had very little personal knowledge of the details of this crucial element in the case, since it was his brother Mario, and not he, who had carried on the actual negotiations with the thieves, and it was Mario who had bought and paid for the stolen goods (Tr., pp. 388, 584-585, 586-587, 589). On the important issue of the defense claim of "reward" for Stracuzza's testimony, the defense was effectively blocked, by the Government's failure to call Mario, from showing (a) that Mario, when arrested, had had $900 in cash on his person, presumably for the purchase of stolen goods; that Dorothy, at the same time, had $1,900 in cash on her person; that this money had been seized by the F.B.I. as evidence; and that these sums were released to Mario and Dorothy, with the prosecutor's consent, after they began to "cooperate" (Tr., pp. 874-875); (b) from showing that Mario had again been caught stealing, after he began to "cooperate", and although indicted in the State court, his sentence there was repeatedly adjourned, on the representation that he was "cooperating" with the Federal authorities, and that he would testify in this case, which of course, he never did (Tr., p. 1158). There can be little doubt that considerations of strategy to accomplish this blocking of cross-examination, rather than any reluctance to clutter the record with cumulative testimony, was the real reason for the failure to call Mario. Mario, we note, did testify at length in the previous trial, and was there subjected to searching and embarrassing cross-examination (Tr., p. 1158).

The prosecutor concluded by telling the jury that "if you believe that the Government has in some way or other

prevented you from getting the full truth of this entire case, that it in some way here concealed the true facts pertaining to any of these defendants, you have only one duty —you have to march into that jury room and acquit everyone of these defendants" (Tr., pp. 1551-1552). We submit that this was an improper tender to the jury of a false issue of the prosecutor's integrity, as a substitute for the real issue of the defendants's guilt. He was giving the jury the ineluctable choice of convicting the defendants, or, in effect, convicting him of impropriety.

Reasons for Granting the Writ

Petitioners Karp and Marco respectfully refer to, and adopt, the "Reasons for Granting the Writ" advanced in the Schaffer petition, at pages 9 to 20, inclusive.

In addition, Karp and Marco submit that the manifest impropriety of the prosecutor's summation, which was promptly objected to, and made the subject of a motion for mistrial, deprived them of a fair trial, and requires the granting of a writ. The court gave no indication that the prosecutor's closing arguments were improper, and administered no rebuke, nor did it give ameliorating or corrective instructions. The affirmance in the court below of this ruling was in conflict with the rules laid down not only in this Court (*Berger* v. *United States* [1935] 295 U. S. 78, 88), and in the Second Circuit (*United States* v. *Spangelet* [1958] 258 F. 2d 338), but with holdings in other circuits (*United States* v. *Tucker*, No. 12,628, Third Circuit Court of Appeals, decided May 8, 1959, not yet reported; *Nalls* v. *United States* [5th Cir. 1957] 240 F. 2d 707; *Snipes* v. *United States* [6th Cir. 1956] 230 F. 2d 163; *Pierce* v. *United*

States [6th Cir. 1936] 86 F. 2d 949, 953), as well as holdings in numerous state courts (*People* v. *Lovello* [1956] 1 N. Y. 2d 436; *People* v. *Tassiello* [1950] 300 N. Y. 425, 428-431; *People* v. *Black* [1925] 317 Ill. 603; *People* v. *Hoffman* [1948] 399 Ill. 57; *Balis* v. *State* [1940] 137 Neb. 835; and see collected cases in 75 A.L.R. pp. 48-59, and 50 A.L.R. 2d, pp. 754-868).

To allow the opinion of the court below to stand, with its acceptance of the prosecutor's summation as a proper answer to the defense summation, would be to open the door to a new type of advocacy on the part of the Government, destructive of basic concepts of fairness.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June, 1959.